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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ANITA NOELLE GREEN, an)	
individual,)	
)	
Plaintiff,)	Case No. 3:19-cv-02048-MO
)	
v.)	
)	
MISS UNITED STATES OF AMERICA,)	June 16, 2020
a Nevada limited liability)	
corporation doing business as)	
United States of America)	
Pageants,)	
)	
Defendant.)	Portland, Oregon
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Oral Argument
(By Videoconference)
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MICHAEL W. MOSMAN
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

FOR THE PLAINTIFF: Ms. Shenoa L. Payne
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(P R O C E E D I N G S)

(June 16, 2020, 9:43 a.m.)

* * * * *

THE COURTROOM DEPUTY: We are here today in Case No. 3:19-cv-2048-MO, Green versus Miss United States of America, LLC.

Counsel, please state your name for the record.

MS. PAYNE: Shenoa Payne for plaintiff.

MR. KAEMPF: This is John Kaempf for defendant Miss United States of America.

THE COURT: Thank you both for being here and available today.

There are some nonconstitutional preliminary issues that I want to talk about first, and then we'll get to the two constitutional doctrines that have been briefed by the parties.

So first there are questions about what I can consider, and that includes the idea of incorporation by reference or not of Exhibits A, B, and C. And so my own tentative view, to start the discussion at least, or to start the case moving forward and get to the constitutional issues, is that it is appropriate for me to consider those for today's purposes. I'll bring that up later, because when we get to discussion of freedom of association, it's -- I'll give away the first point in advance, and that is that I'm seriously considering delaying resolution of that matter until we have

1 limited discovery, and then taking it up as a question at
2 summary judgment, not motion to dismiss, in which case that
3 would also resolve the issue of how I ought to consider
4 Exhibits A, B, and C. So I don't need to hear more about that
5 for today's purposes on considering A, B, and C.

6 The second is the statute of limitations issue. And
7 so, again, I'll give you my tentative decision, and then I do
8 have a question for plaintiff's counsel.

9 It does appear to me that even if the factual dispute
10 I have in front of me about the statute of limitations goes
11 defendant's way and otherwise limits some of the discrete
12 events or harms that can be considered, that at a minimum the
13 case goes forward on injunctive relief.

14 Do you have any contrary view about that, Mr. Kaempf?

15 MR. KAEMPF: No, Your Honor. That's basically our
16 position, and I'm glad that you brought up the separate nature
17 of the injunctive, because I was going to do that as well. So
18 agreed, Your Honor.

19 THE COURT: All right. And so with that in mind,
20 since the case will go forward in any event, I'll also, on a
21 better record at summary judgment, consider any other issues
22 about the overall application of the statute to the nature of
23 relief that can eventually be sought by plaintiff here.

24 Ms. Payne, I do have a question, just to make things
25 simpler for us here. There is this fact dispute about the

1 Facebook screenshots in Exhibit Z -- Exhibit B as to whether
2 they really did occur on December 7th or December 20th. Do you
3 have a position on that today?

4 MS. PAYNE: I think that the exhibits show that they
5 did occur on December 7th. We didn't have access to those at
6 the time we filed the complaint because Ms. Smith had removed
7 those from Facebook. And so we would concede that for -- if
8 you're going to consider the Exhibits A through C, that it
9 would establish the Facebook conversations did occur
10 December 7th.

11 I don't know if you want argument on whether that
12 should limit the plaintiff's claim to damages or injunctive
13 relief at this time or whether you want to hear that later.

14 THE COURT: No, I'll take that up later. Thank you.

15 As I said, what I'm doing with the statute of
16 limitations is waiting to resolve it formally. We know the
17 case will go forward at least in part, and there's the open
18 question then about whether it's purely an injunctive case or
19 whether it includes the January application and return of the
20 fees, et cetera, and we'll just deal with that later.

21 All right. The third issue is whether plaintiff
22 properly alleged that the denial of her application was because
23 of her gender identity. And that's a -- in one sense, that's a
24 serious issue, in that I think the allegations are somewhat
25 conclusory. In some cases, it's not at all clear how an

1 amended complaint would take care of that problem, and here, in
2 my view, at least, it's abundantly clear how an amended
3 complaint could take care of that problem rather easily. I
4 think we could probably have an amended complaint that solves
5 the problem by noon today.

6 So at the end I'll come back to that. I'm likely to
7 require amendment in order to satisfy that demand, but I'm not
8 going to defer talking about the issues today because I view
9 the problem so readily solved.

10 So the last preliminary issue, and one that I'm
11 obligated in the sort of chain -- the decision tree in this
12 case, the hierarchy of analysis -- to take up first is
13 whether -- what to do with the Oregon state constitutional
14 argument.

15 And so that argument plays forward in the briefing on
16 the merits, except for plaintiff's argument that I ought not to
17 consider it because it's entirely derivative of the federal
18 First Amendment argument, and derivative application of Oregon
19 free speech in a case that also has First Amendment arguments
20 has been frowned upon in Oregon courts.

21 I disagree that it's so derivative that it runs afoul
22 of the principle that I've just described, and so I am going to
23 consider it on the merits. I'm not going to hear argument
24 about it because I think it does require, at a minimum, some
25 thought about the free speech implications first. And my own

1 tentative view -- quite tentative at this point, but enough to
2 form how we're going to go forward at oral argument -- is that
3 the Oregon constitutional argument does not go defendant's way.

4 I bring that up only to say that because of that, it
5 makes sense to consider the federal constitutional arguments.
6 Otherwise, if I were highly confident that defendant would win
7 under the Oregon Constitution, there would be no need to
8 consider further arguments. But because I see it in a
9 different way, I'm going to focus all of our attention today on
10 the two federal constitutional arguments.

11 So I want to start with the free speech argument, and
12 I'm going to get to my questions here in just a moment, but I'm
13 going to tell you in advance that I'm going to be asking you a
14 hypothetical. And I've struggled lately with attorneys and
15 hypotheticals. I don't think I'm going to struggle today,
16 because my impression from the briefing is that the two of you
17 are adept at juggling ideas in constitutional cases, but I'll
18 just tell you this. When I ask a hypothetical, you don't have
19 to say, "Well, that's not my case," and "Reserving my arguments
20 to the contrary," et cetera. I understand that when you answer
21 my question, you're only answering a hypothetical.

22 And it's not quite a hypothetical. It actually just
23 asks you to imagine a world in which *Hurley* hasn't happened
24 yet. For reasons I will get to later, I think it will help us
25 look at the case without *Hurley*, and then ask the question how

1 *Hurley* applies.

2 So since, Mr. Kaempf, you've devoted several pages to
3 *Hurley*, don't worry, we're going to get to *Hurley* and how it
4 applies, but I want to ask first how we might think about the
5 case before we apply *Hurley*.

6 MR. KAEMPF: Your Honor, John Kaempf for the
7 defendant. May I begin?

8 THE COURT: Well, I haven't -- I'm now on my first
9 question, and so here we go.

10 MR. KAEMPF: Oh, no, I am sorry. You go ahead, Your
11 Honor.

12 THE COURT: Thank you.

13 So the first question is, under traditional First
14 Amendment analysis, the first question is does the OPAA
15 regulate speech or conduct on its face. We'll get to the
16 question that's more the subject of all your briefing, but I'm
17 assuming on that first question, which is the question we first
18 ask in this line of cases that takes us towards *Spence* and
19 *O'Brien* eventually, whether the OPAA regulates speech or
20 conduct on its face. So that's not asking what relief
21 plaintiff is seeking in this case, it's rather a step upward in
22 the sort of telescopic decision tree here.

23 So, Mr. Kaempf, I'm assuming the answer to that
24 question is agreed upon by all of us, that on its face the OPAA
25 only regulates conduct. Do you agree?

1 MR. KAEMPF: Well, I would agree that what we're
2 talking about today, Your Honor, is an as-applied challenge
3 based on what's alleged in the complaint.

4 THE COURT: All right. So that's easy. The next
5 question is the one you just raised, and that is as applied
6 here, is the conduct being regulated -- that is, another way to
7 think about it is the way you, Mr. Kaempf, framed it, and that
8 is is what plaintiff is seeking here the regulation or
9 enforcement of expressive conduct subject to First Amendment
10 protection, or is it just conduct, not something in the First
11 Amendment?

12 I'll start with you, Mr. Kaempf.

13 MR. KAEMPF: Your Honor, what we are seeking to do
14 here is regulate our right to associate. That's a First
15 Amendment right. And in the *Roberts v. Jaycees* case from the
16 U.S. Supreme Court, the Court said, "The freedom of association
17 plainly presupposes the freedom not to associate."

18 And then going from *Roberts*, you have the *Dale v. Boy*
19 *Scouts* case, and in that case, the scoutmaster, you know from
20 the brief, he was openly gay, and much like the plaintiff here,
21 as is her First Amendment right, Mr. Dale was an open gay
22 rights activist, like the plaintiff is a transgender activist.
23 And the Court in *Dale v. Boy Scouts* held that the plaintiff
24 could not force his inclusion into the Boy Scouts, which
25 opposed the homosexual conduct, according to its statement of

1 values, and morally clean and straight and all of that.

2 So I know you --

3 THE COURT: I'll pause you there for a moment.

4 MR. KAEMPF: But I do think *Boy Scouts* and *Dale* is
5 very important again because of being an activist and the Boy
6 Scouts opposing homosexuality, and you cannot have a forced
7 inclusion.

8 And that is exactly what the plaintiff is asking for
9 here. She admits in the complaint that my client's pageant is
10 a public platform, and wants to force my client to include her
11 message that is contrary to my client's, which is to empower
12 biological natural-born females.

13 And also, Your Honor --

14 THE COURT: Mr. Kaempf, can you hear me all right?

15 MR. KAEMPF: Yes.

16 THE COURT: All right. I need to pause you there for
17 a moment for two reasons. One, I know this is a little tricky,
18 but it's very helpful to the court reporter and me if you make
19 sure that when you're not speaking you're muting your computer.
20 Can you do that for me, each of you?

21 MR. KAEMPF: Oh, my computer is off. Certainly.

22 THE COURT: Right. So that's number one.

23 And then number two, I'm asking questions that take
24 us through the traditional First Amendment analysis for free
25 speech along the lines of *Spence* and *O'Brien*, and which will

1 eventually get to *Hurley*. So we're not in the same ballpark as
2 *Dale* yet. I guess I'm not ready to hear about *Dale*.

3 I take it from your argument, though, that you -- and
4 from your briefing that you are adamant on the point that
5 what's being regulated here is expressive conduct; that the
6 relief plaintiff --

7 MR. KAEMPF: Yes. And the First Amendment right of
8 free association, which includes who to not associate with.

9 THE COURT: Well, one at a time. All right? We'll
10 get to association, but it will only muddle your point if you
11 try to join *O'Brien* and *Spence* on one hand and *Dale* together.
12 We'll come to *Dale* later.

13 Fair enough?

14 MR. KAEMPF: Certainly, Your Honor.

15 I would also briefly mention -- I don't know if
16 you'll view it as the same or not, but the *McDermott* case, the
17 2010 Ninth Circuit case, which holds that newspapers which are
18 for profit, like my client, they have the First Amendment right
19 to choose their writers and who submits op-eds in a for-profit
20 situation. And, again, that also involves First Amendment
21 rights of speech and association. So that's another important
22 case separate from *Hurley* and *Dale*.

23 THE COURT: Thank you.

24 Ms. Payne, same question. Is the conduct being
25 regulated here what you would call under traditional First

1 Amendment analysis expressive conduct?

2 MS. PAYNE: No, Your Honor. The defendant in its
3 brief focuses on two expressive -- the content of its pageant,
4 its mission or message that defendant asserts is promoting
5 biological women is expressive content, and in selecting its
6 contestants.

7 The first is not in the pleadings or in Exhibit A.
8 Defendant's mission or message, which we would not dispute is
9 an important expressive content, is promoting women, promoting
10 or uplifting women. That in itself could be expressive
11 content, but it is not, as defendant says, promoting biological
12 women or cisgender women, which I think is more appropriately
13 described.

14 THE COURT: Can I pause you there for just a moment?

15 So that's an argument that there can be a message
16 here that is expressive conduct.

17 MS. PAYNE: Correct.

18 THE COURT: But that nothing you're requesting by way
19 of relief runs afoul of that message, right?

20 MS. PAYNE: Correct. And so our argument is that
21 this Court doesn't even really need to decide whether there is
22 expressive content because defendant can't show that anything
23 plaintiff is asking for would interfere with that expressive
24 content. So even if this Court were to decide that there is
25 expressive content, it really doesn't need to decide that

1 either way because defendant can't show prong two, which is
2 that what plaintiff is requesting would ever interfere with
3 such expressive content.

4 So whether this Court decides there is or isn't
5 really isn't going to decide this issue. It is whether what
6 plaintiff is requesting is going to interfere with that
7 expressive content. So we would concede that potentially there
8 is expressive content here, it's just what plaintiff is asking
9 for isn't going to interfere with what defendant has
10 actually -- its message is actually put out to the public.

11 THE COURT: So I have to two questions about that, if
12 I could ask. The first is not so much a question, I guess --
13 Well, it is. That argument you've just made about interference
14 or not with the core message of a group is why you think your
15 relief doesn't run afoul of First Amendment analysis, but why,
16 say, a non-Native American applicant might run afoul of the
17 message of a Native American pageant, right?

18 MS. PAYNE: That's absolutely correct.

19 THE COURT: And then, secondly, your argument does
20 depend on the message that the pageant in our case is
21 advancing, including -- well, not being limited to biological
22 women. If the message were, in fact, hypothetically speaking,
23 a pageant for biological women, then your client's application,
24 in the same way as we just talked about with the Native
25 American pageant, would have a different impact on that speech,

1 right?

2 MS. PAYNE: It would, but I just want to be clear
3 that -- I mean, you don't want to talk about *Hurley* yet, but
4 the law is very clear that the exclusion isn't message based.
5 The exclusion here is only status based, and that's another
6 reason why the defendant's argument fails, because this --

7 THE COURT: Well, before you make that argument,
8 that's why I asked the question about the Native American
9 pageant, because the --

10 MS. PAYNE: -- (indiscernible) the associational
11 claim and the selection claim, why selection in itself is also
12 not (indiscernible).

13 Also, there's nothing on the pleadings for the
14 defendant prior to discovery that shows that it also exercises
15 any sort of creative control over the selection of its
16 contestants, which, you know, absent any sort of discovery or
17 showing on the pleadings -- which defendant can't do -- it
18 doesn't exercise any sort of creative control over the
19 selection of its contestants, such that it needs to preserve
20 the expressive content of its pageant in a way that defendant
21 is arguing.

22 So I think there's --

23 THE COURT: Let me just get back to the Native
24 American pageant for a moment, because I was interested in your
25 answer there, and I think it helps me understand your position.

1 So we are just talking about the First Amendment free
2 speech guarantee right now, not freedom of association. As I
3 told Mr. Kaempf, we'll get to association in a minute.

4 So I thought your view was that your client doesn't
5 interfere with the potentially creative expression of a pageant
6 celebrating women, and conversely, if you have a pageant that's
7 openly celebrating Native American women, that the admission of
8 a non-Native American would interfere with that message.
9 That's your first point, right? Do you agree with that?

10 MS. PAYNE: Yeah, I would. I mean --

11 THE COURT: Just let me get a quick answer to that
12 argument.

13 MS. PAYNE: (Indiscernible) the *Apilado* case out of
14 Washington. I mean, they had an entire gay identity wrapped up
15 in their softball league, and they really promoted the softball
16 league around that gay identity. And so I think that --

17 THE COURT: Let me stop you there.

18 To your point that this doctrine really only matters
19 if you're excluding based on message not status, I mean, what
20 we're talking about with the Native American pageant -- it's a
21 hypothetical but it actually exists -- is exclusion by status,
22 right, not by message?

23 MS. PAYNE: Yes.

24 THE COURT: And so I guess I'm asking is it or is it
25 not the case that you can run afoul of free speech protections

1 if your exclusion is by status? You've suggested if the
2 exclusion is by status, it can't possibly run afoul of First
3 Amendment protection, but if you have a Native American pageant
4 and you exclude by status anyone who is not Native American,
5 you've also suggested that could run afoul of the First
6 Amendment. So how do you reconcile those?

7 MS. PAYNE: I think we're getting into the free
8 association aspect versus the free speech, but I think the free
9 speech is you have to exclude based on message not status. I
10 think --

11 THE COURT: I'm going to pause you there. So when
12 you told me that there could be a problem with a Native
13 American pageant allowing, being forced to allow in a
14 non-Native American, your answer was essentially grounded in
15 the freedom of association not freedom of speech?

16 MS. PAYNE: Right. Yes, I believe that's correct.

17 THE COURT: And so you don't think, I take it, that
18 there's a First Amendment issue involved in requiring -- excuse
19 me, I shouldn't have said that. A free speech issue involved
20 in requiring a Native American pageant to let in non-Native
21 Americans?

22 MS. PAYNE: Yes. And to the extent that I said
23 otherwise earlier, I was then referring to freedom of
24 association not freedom of speech.

25 THE COURT: And you have the same answer in our

1 pageant for allowing -- being required to allow in men who
2 identify as men. Do you think that's only a freedom of
3 association question or does it also run afoul of *Spence* and
4 *O'Brien*?

5 MS. PAYNE: I think that would be a freedom of
6 association issue not a freedom of speech issue. It would have
7 to be based on message not status. I think when we get to
8 freedom of association that we may have problems talking about
9 freedom of association based on the core message of the
10 pageant, and permitting men into the pageant would interfere
11 with -- for associational reasons but has nothing to do with
12 the message that the men are speaking. It has everything to do
13 with who the men are and their status.

14 THE COURT: Well, I thought earlier your argument was
15 certainly if you have a pageant that only allows in and
16 celebrates the beauty of Native American women, and you're
17 forced to allow in non-Native American women, that can
18 interfere with the message, right? I thought your point was
19 just that too bad, because we don't protect exclusions based on
20 status as opposed to message.

21 MS. PAYNE: So it's not just whether it interferes
22 with the pageant message, because that -- you're saying that
23 that forces the -- that somebody's status can force the pageant
24 to speak a message. *Hurley* says otherwise. Cases that follow
25 *Hurley* say otherwise, that someone's status cannot force

1 someone to speak a message. It has to be message based. *Klein*
2 said otherwise, cases following *Klein*. If you look at *Elaine*
3 *Photography* out of New Mexico, all these cases say if you try
4 to exclude an entire group based on their status, that's not
5 forcing someone to speak a message. It's the cake-baking
6 cases. It's all these cases where you say you're not forcing
7 someone to put a message on a cake, what you're doing is you're
8 refusing service altogether. And so that's not forcing someone
9 to change the expressive content of their expressive activity.
10 You're just -- you're just forcing them to include someone in
11 their services.

12 THE COURT: Thank you very much. I appreciate it.

13 Mr. Kaempf, so same sort of question. You said it's
14 expressive conduct here, and how would you then -- again, we're
15 just taking a minute here to talk about the case under
16 traditional First Amendment analysis. So how would you apply
17 the two -- the two cases you never really applied in your
18 briefing, and that's *Spence* and *O'Brien*? How would they apply
19 here if you had to apply them?

20 MR. KAEMPF: Well, the expressive conduct is stated
21 in the preexisting rules that are not disputed and that are in
22 the record that this is about empowering biological women and
23 natural-born females, and in promoting, quote, sisterhood. And
24 that is my client's right to promote that, and that's what its
25 pageant has found. And then what we have is not a status issue

1 but someone who says, no, you must change that and now include
2 me and my opposing view that transgender women are the same as
3 biological women. That violates both our First Amendment, free
4 exercise -- excuse me, free speech, as well as the right of
5 association.

6 THE COURT: All right. Thank you.

7 So then how -- I'll start with you, Ms. Payne. How
8 does *Hurley* change the analysis that would traditionally be
9 engaged in under *O'Brien* and *Spence* here, if at all? What's
10 your view on what *Hurley* did to preexisting free speech case
11 law? Ms. Payne?

12 MS. PAYNE: Well, *Hurley* basically says that
13 organizations can't be forced to speak a message or include
14 somebody else's message that they disagree with. And our
15 argument is that *Hurley* doesn't apply here, particularly
16 because defendant rejected plaintiff without asking what
17 plaintiff's message was, and it's excluding transgender women
18 not based on any potential message that transgender women are
19 potentially speaking. It's a status-based exclusion.

20 And *Hurley* expressly spoke about the fact that in
21 *Hurley*, LGBT people were allowed to participate in the parade,
22 and that it wasn't an across-the-board status exclusion but it
23 was based on the fact that this particular LGBT group was
24 carrying a banner and celebrating the -- their LGBT status as
25 an Irish pride LGBT person, and that that was against what the

1 parade providers were -- it was against their core message, and
2 the parade providers didn't want to carry that message as part
3 of the parade.

4 THE COURT: All right. Can I pause you there for a
5 moment? I'd like to restate your argument just to see if I
6 have it right.

7 MS. PAYNE: Perfect.

8 THE COURT: So I think you're saying that *Hurley*
9 starts with the overall question, you know, about public
10 accommodations laws, but ends up saying that they don't -- that
11 public accommodations laws, in terms of what was being sought
12 for relief in *Hurley*, simply didn't apply; that is, that people
13 could join the parade, there was no limitation on participation
14 based on status, and that somewhere along the way the
15 enforcement of the law on the particular facts in *Hurley* had
16 resulted in the direct regulation by state statute of speech.
17 In fact, it had resulted in compelling speech. But that
18 without that, without that sort of set of facts that take the
19 case outside of public accommodations laws, *Hurley* doesn't
20 necessarily apply. Is that your argument?

21 MS. PAYNE: That's correct.

22 THE COURT: And then I do want to ask, your complaint
23 suggests that plaintiff's participation in the pageant is
24 driven by a desire to share a message. How does that bring or
25 not bring this case within *Hurley*?

1 MS. PAYNE: Because her message is not LGBT based.
2 It's not transgender based. It's not any different message
3 than any other participant would share. It's to be an example,
4 to -- to be a positive example, and that's exactly consistent
5 with what defendant's message is, to promote all women, and
6 that's what plaintiff's message is, to promote women. So
7 unlike the individual in *Hurley* who wanted to carry a banner
8 promoting (indiscernible) message, plaintiff has not stated
9 that she's going to have a message promoting transgender women
10 or LGBT issues, and that's also not what plaintiff has said
11 that her message is going to be. And so her message is
12 absolutely consistent with defendant's stated mission.

13 THE COURT: Thank you.

14 So does that mean that for, again, for First
15 Amendment free speech implication only, not freedom of
16 association, that a biological male applicant who wanted to
17 promote women and be consistent with the message of this
18 pageant, under Oregon's public accommodation law, would be
19 required to be allowed to enter the pageant?

20 MS. PAYNE: Well, I dispute calling my client a
21 biological male.

22 THE COURT: No, I didn't. That wasn't my question at
23 all.

24 MS. PAYNE: Sorry, sorry.

25 THE COURT: I was asking about the implication of

1 your argument. Does your argument mean that if a biological
2 male applicant wanted to join the pageant and step up and
3 enhance the message of the pageant to further the cause of
4 women, that the OPAA would require the pageant to allow him to
5 enter, at least as against only a free speech challenge?

6 MS. PAYNE: On a free speech challenge only? I think
7 so, on a free speech challenge only.

8 THE COURT: All right. Thank you very much.

9 Mr. Kaempf, same question. We talked about the --
10 well, actually backing up to the original question, not the one
11 I just asked, we talked about the application of traditional
12 free speech cases. Now I'm asking you how did *Hurley* change
13 the landscape of that at all?

14 MR. KAEMPFF: Sure.

15 And back to when you mentioned *O'Brien*, the
16 traditional First Amendment you talked about, as mentioned in
17 our brief, what -- the relief plaintiff requests is not
18 narrowly tailored to serve a compelling interest. And so it
19 would fail under that as well under our brief.

20 The way that *Hurley* changed it is by making even more
21 express what was first recognized by the United States Supreme
22 Court in 1958, that the First Amendment also contains a right
23 of free association, and further *Hurley* held -- as you know,
24 that was the GLIB, the LGBTQ group that this Boston Veterans
25 Council, in the St. Patrick's Day Parade, they could not be

1 forced to include their banner because that freedom to
2 association, recognized in 1958 -- and *Hurley* amplified it
3 also -- included the freedom not to associate, as stated in the
4 1984 Roberts opinion.

5 So I would submit that we would win on this even if
6 *Hurley* didn't exist under the prior *O'Brien* analysis, but
7 *Hurley* and then *Dale* I think really is the end of plaintiff's
8 case on the First Amendment issue because of both free speech
9 and free expression and the right to not associate.

10 THE COURT: Thank you.

11 MR. KAEMPF: Your Honor, to something that Ms. Payne
12 just said. She said, you know, this contest is to promote
13 women, but, you know, she skips over the key point, which is
14 that it's undisputed from her allegations in the exhibits we're
15 allowed to incorporate that we only promote biological women,
16 natural-born females. That's not a small business. That's the
17 heart of it.

18 And I would also mention that the very fact that
19 we're having this lawsuit proves our free association point.
20 Plaintiff admits that she wants a, quote, platform for her view
21 of what it means to be a woman and all that, and she went out
22 and sought a bunch of media attention locally and nationally.
23 And that's exactly our point. Her position is unless you agree
24 with me and I am ordered by the Court, I'm going to be included
25 in your pageant. If you don't do that, you're going to be

1 punished through some big damages and attorney fees.

2 So the fact that we're here and all the media
3 attention is exactly why we have *Hurley* and *Dale* holding no,
4 with respect, you cannot do that. You can be an activist but
5 there are other pageants like Ms. Universe that you can go to
6 but not ours.

7 And I think it's important to point out that the
8 point of the First Amendment is that we have a diversity of
9 opinions. No one is attacking the plaintiff for being
10 transgender, but we have competing opinions. That's what the
11 First Amendment is about. And what they want is, she says, I
12 get to speak what I want, but you, defendant, don't get to have
13 your unique message. That is not allowed because the First
14 Amendment is a two-way street.

15 THE COURT: All right. Thank you very much.

16 I want to turn to the freedom of association. And
17 the first question really is whether the pageant here is or is
18 not an expressive association. I'm going to ask a question
19 that won't require you to cite a lot of facts, but rather it
20 will ask you to tell me a methodology.

21 So my question is what is the test or the method in
22 the case law determining whether a group is an expressive
23 association or not? What's the test?

24 I'll start with you, Ms. Payne.

25 MS. PAYNE: Well, thank you, Your Honor, for pointing

1 out to the *IDK* case. I think the test is actually a little
2 squishy, and it's not exactly clear, and it does rely on a lot
3 of facts as to whether an organization is expressive versus
4 commercial, for instance. And it does depend on a lot of
5 facts, and I think Your Honor made a good point by sending us a
6 lot of questions about how an organization, for instance,
7 generates revenue and expresses contestants' views, but I think
8 that even the Ninth Circuit case, it cited to a Supreme Court
9 case, which I'm sorry, I'm blanking on right now as to, you
10 know, that it's not always easy to tell.

11 And this is one of the reasons why I asked for
12 discovery in this case, because I think that, for instance, in
13 this case, there are certain aspects of this pageant cited in
14 Defendant's Exhibit A that involve a personal interview and an
15 on-stage question that could be considered expressive, but I
16 don't -- I haven't had the opportunity to explore what those
17 entail, and it's really unclear at this point what those are.

18 And as I cited in my brief, you know, pageants have
19 been considered expressive before, but they had talent
20 portions, so this pageant doesn't appear to have a talent
21 portion, but it's really unclear what -- it's kind of like you
22 know it when you see it, it seems to be how the cases seem to
23 treat what is truly expressive versus not expressive. And I
24 don't know that there's a particular test, but cases seem to
25 say, you know, art and TV shows are expressive, and I don't

1 know that this pageant really reaches that kind of expressive
2 activity, but surely on the face of the pleadings, I don't know
3 that you can reach that.

4 And as I stated before, I don't know that this Court
5 needs to decide that issue because there is no interference
6 with that expressive activity, even if this Court were to
7 decide it were expressive activity, but I think that the
8 questions that the Court sent us as to whether this particular
9 pageant is inherently expressive certainly can't be decided on
10 the face of the pleadings, and discovery is needed to determine
11 that question.

12 THE COURT: So if I can summarize briefly, you're
13 telling me first that there is no identifiable test?

14 MS. PAYNE: I don't think so, not that I can tell
15 from the cases, and it seems to be that courts seem to say that
16 you know it when you see it.

17 THE COURT: You know, I've heard Potter Stewart
18 saying he's hated ever having that quoted back at him, so I'm
19 reluctant to use it to decide a case.

20 Secondly, if I do order discovery, I'm ordering
21 discovery without knowing what its limits are because I don't
22 know what it is that you're supposed to go discover.

23 What would be the limits of discovery if there's no
24 identifiable test? What would you want to go discover?

25 MS. PAYNE: Well, particularly I think one of the

1 questions that I wanted discovery on in my declaration, as I
2 think is important to this Court, is whether any sort of
3 expressive activity is actually defendant's expressive activity
4 or the contestant's expressive activity. I think that's an
5 important question for this Court, and something that this
6 Court asked us to answer today during oral argument is whether
7 the -- whether defendant actually has any sort of disclaimer to
8 the public that the contestants or individuals that are
9 competing against each other, whether, you know, during their
10 personal interview and when they're asking a question on stage,
11 whether that is their own individual expression or whether that
12 is defendant's expression.

13 THE COURT: So you suggested that I don't need to
14 care about this answer too much because even if it is an
15 expressive association, there's nothing about what plaintiff is
16 seeking by way of relief that affects the association's ability
17 to express its viewpoint.

18 That gets us back, doesn't it, to the sort of
19 definitional argument you're making that if you define women in
20 the way that your case defines it, then there's no impact on
21 their message, but if defendants define women the way they
22 assert they want to define it, wouldn't you agree that it would
23 impact their message -- excuse me, their association?

24 MS. PAYNE: Yes, but I -- again, I want to be very
25 clear that -- and case law is very clear that a discriminatory

1 membership policy, *Roberts* says this and the Oregon Supreme
2 Court has said this in *Lahmann* -- or I think it was the court
3 of appeals -- excuse me -- in *Lahmann* that a discriminatory
4 membership policy in and of itself cannot serve as expressive
5 content or conduct and cannot be the basis for a freedom of
6 association claim. And so that's all that defendant has is a
7 discriminatory membership policy.

8 THE COURT: If I'm agreeing that it's an expressive
9 association, then the next step is to sort of get at what
10 they're expressing, right, what their message is? Doesn't *Dale*
11 suggest that I should show deference to the organization's own
12 statement about what its message is?

13 MS. PAYNE: Not when the statement is contradicted by
14 their own -- by their own Exhibit A and their own website and
15 by their own information that they're attributing to the
16 public, which they're basically silent on anything regarding
17 transgender women, cisgender women. What they say is that
18 their goal is to promote women and uplift everyone, that the
19 idea of ethnicity and beauty is what lies within, and what
20 they're saying to the public is contrary to what they say that
21 their message is. Their only message lies in a policy, and
22 what the *Fair* (ph) case says is just because discrimination is
23 written down does not make it expressive conduct.

24 THE COURT: Thank you very much.

25 Mr. Kaempf, same question. By what test do I

1 determine whether your client is an expressive association or
2 not?

3 MR. KAEMPF: Yes, Your Honor. I would look to *Dale*
4 and *Hurley*, which is the basically are you requiring us to at
5 least expressively endorse a message that is contrary to our
6 own. And here it's even more express than in *Dale*. They just
7 wanted to silently march, but this plaintiff wants to compete
8 as a transgender female. And so I would look to *Hurley* and
9 *Dale*, and again in *Dale* the issue was, okay, you are an open
10 homosexual activist, that's your right, but the Boy Scouts does
11 not support homosexuality or the lifestyle, as they call it in
12 the case. That's test I would look to from *Dale* and *Hurley*.

13 I would also point out that Ms. Payne just said,
14 well, the defendant is silent about the issue of what it is to
15 be a woman. That's not true. Her complaint says -- and then
16 it's confirmed by the website that you can incorporate, that
17 the pageant is for biological natural-born females. So we are
18 not silent about that issue.

19 The other point I would note is that in *Hurley* the
20 Court noted, kind of chiding the veterans parade, saying, you
21 know, what they're doing, what their message is is barely
22 articulated. But it's a little more. And I think ours is a
23 lot more than barely articulated, which was enough in *Hurley*.
24 We support biological natural-born females, and we want to
25 promote sisterhood, and that is our definition of what it means

1 to be a woman.

2 And, again, we're not attacking the plaintiff
3 personally for disagreeing, we're just saying that under the
4 First Amendment, we get the right to believe that, and she
5 cannot be forced into our pageant. And she does carry our
6 message, like in the *Claybrooks* case, for example, when they
7 talked about who a TV station hires to be an anchor, because
8 Ms. Payne is trying to say, oh, it's really just the
9 contestants that are giving the message. No, not when you say
10 in your complaint that you want to use our "platform" to say
11 that, then you are contradicting and making a message through
12 the Miss United States of America Pageant. So you can't just
13 slice it off that way.

14 And it's also like when we talk about the cases that
15 we mentioned, *McDermott* from 2010 from the Ninth Circuit, a
16 newspaper, the people -- the writer that chooses -- sure,
17 they're the speaker, but they are carrying the defendant's
18 message, like someone who submits an op-ed, and that is subject
19 to First Amendment protection.

20 So I think that that's important to note that we're
21 not silent, we're expressly --

22 THE COURT: Mr. Kaempf. Mr. Kaempf.

23 MR. KAEMPF: -- biological natural-born females.

24 And I also wanted to point out, Your Honor, on what
25 is expression. We cited to you in the brief the *Norma Kristie*

1 case. That was the gay pageant, where it was men dressing up
2 as women, I believe gay men, and that was their pageant. And,
3 again, that's their right. That's their First Amendment right.
4 But in that case, in *Norma Kristie*, the Court recognized that
5 that is expression.

6 And so in our pageant as well, although it is the
7 other side of the coin in First Amendment law, it is a pageant
8 that says no, only natural-born biological females.

9 So when you look at *Claybrooks* and *Norma Kristie* and
10 the *McDermott* opinion and *Hurley* and *Hale* -- *Dale*, excuse me,
11 you've got that expressive conduct and the right of association
12 all around.

13 And, again, we are not attacking her personally. She
14 can do what she likes in all these other contests -- she won
15 the other contest in Oregon. And, again, we don't dispute that
16 Ms. Universe allows transgender females, but we do not, and
17 that's our right. And as in *Dale* and *Hurley* we, with respect,
18 ask that you not force us to include the plaintiff, because
19 under *Dale* and *Hurley*, this is not new ground, this is why they
20 published the cases, and you cannot force this person to be
21 included in our group. That violates the fundamental right of
22 free association.

23 Thank you, Your Honor.

24 THE COURT: Thank you.

25 Yeah, I need you to take a breath every now and then

1 so I can guide the discussion a little better.

2 So I am going to send this case forward on limited
3 discovery to summary judgment, and the limited discovery will
4 be on the question of expressive association. And so the
5 parties will explore, as they see appropriate, the information
6 they think is necessary to better answer at the summary
7 judgment stage whether this is or is not an expressive
8 association.

9 I am limiting discovery at this point to written
10 discovery. I'm not allowing depositions. I don't think they
11 will ever be necessary, but you'll have to at least start with
12 the typical written discovery to make the case later if you
13 actually think some sort of deposition will become necessary,
14 and I'll consider that.

15 So on the idea that this can be resolved on written
16 discovery and then repositioned as a motion for summary
17 judgment, but limited in its factual development to this
18 question of expressive association, how long do the parties
19 think they need? I was thinking something on the order of 90
20 days.

21 Mr. Kaempf, what do you think?

22 MR. KAEMPF: Ninety days is fine, Your Honor. We can
23 make that work.

24 THE COURT: Thank you.

25 Ms. Payne?

1 MS. PAYNE: Yes, 90 days is fine.

2 THE COURT: So 90 days is when I'm saying discovery
3 would wrap up and you would replead it as summary judgment.
4 You can rely on your briefing that you've given me already and
5 just supplement it with what you think the facts you've learned
6 mean in the context of summary judgment.

7 The other thing, of course, that will happen in 90
8 days is that instead of a big question about whether I ought to
9 incorporate by reference Exhibits A, B, and C, you can inquire
10 into them and authenticate them, and they'll become actual
11 exhibits for summary judgment.

12 I want to ask -- and I'll start with you,
13 Ms. Payne -- whether you see for the limited purpose of
14 resolving these constitutional questions any other issue that
15 you believe firmly needs further factual development, not to
16 win on the merits but just to resolve these two constitutional
17 issues.

18 MS. PAYNE: Well, I'm sorry, can you -- are there
19 other factual issues other than Exhibits A, B, and C, or other
20 factual issues that would be needed outside of the written
21 discovery that you've allowed?

22 THE COURT: Thank you.

23 What I'm allowing is limited discovery, limited both
24 by topic and by method -- that is, by topic it's on expressive
25 association, and on method it's on written discovery, so that

1 we can move to summary judgment on largely the same record that
2 we have, but an expanded factual record and a different
3 procedural posture on the question before me.

4 So I've limited it to the issue of expressive
5 association. Is there another issue on these constitutional
6 questions that you think requires more factual development
7 than -- to resolve it?

8 MS. PAYNE: And so when you say limiting to
9 expressive association, are you limiting discovery to whether
10 the pageant is an expressive association, not on the overall
11 issue of freedom of association?

12 THE COURT: The former. I'm limiting it to whether
13 the pageant is or is not an expressive association. Do you see
14 any other issue that requires some sort of similar limited
15 brief factual development?

16 Let me do this, Ms. Payne. I'll give you 24 hours to
17 think about that. You'll submit an email to the Court if you
18 think there's some other issue that in the 90-day window we're
19 opening up here requires further factual development.

20 How about you, Mr. Kaempf? Any other issue you think
21 requires limited factual development?

22 MR. KAEMPF: Well, our position, Your Honor, would be
23 that we don't think there's any discovery, but of course we
24 respect what you just ruled on the 90 days, limited to the
25 freedom of expression.

1 If I could, Judge, will we also push anti-SLAPP down
2 the road? Because I don't want to launch into that if you
3 don't want to hear that today.

4 THE COURT: Correct.

5 MR. KAEMPF: Okay. And then I would just also
6 mention briefly, if I could, counsel brought up the *IDK v.*
7 *Clark County* case.

8 THE COURT: I don't need to hear more about that
9 right now.

10 MR. KAEMPF: You do not. Okay. That is just fine.

11 Your Honor --

12 THE COURT: In 90 days you'll submit further
13 briefing, and again keep in mind you don't need to redo an
14 entire summary judgment brief. You can, if you choose to, but
15 you can also just rely on what you've briefed. And then tell
16 me by way of briefing, simultaneous briefing in 90 days --
17 Well, actually let's do this. Mr. Kaempf, it's going to be
18 your motion for summary judgment, so in 90 days you'll file
19 your motion for summary judgment, and you'll be able to rely on
20 Exhibits A, B, and C, and any facts that you think help you on
21 the question of expressive association.

22 And according to the normal rules, Ms. Payne, you'll
23 respond, and Mr. Kaempf, you'll reply.

24 MR. KAEMPF: Thank you, Your Honor.

25 THE COURT: The initial brief will be due in 90 days,

1 and then we'll take it from there.

2 MR. KAEMPF: Thank you, Judge.

3 THE COURT: And the parties will engage over the next
4 90 days in the limited written discovery that I mentioned a
5 moment ago, no depositions.

6 MR. KAEMPF: Okay.

7 THE COURT: All right. Thank you.

8 MR. KAEMPF: Thank you, Your Honor. Thank you very
9 much.

10 THE COURT: Good day.

11 (Proceedings concluded at 10:39 a.m.)
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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

June 30, 2020

BONITA J. SHUMWAY, CSR, RMR, CRR
Official Court Reporter

DATE

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